ATHENIAN MAGISTRATES AND SPECIAL PLEAS[1]

By George Miller Calhoun

The Athenian magistrate in whose court a παραγραφή was filed to bar an action at law very often suspended proceedings in the original action and referred the issue raised by the special plea to a dicastic court for decision.[2] He was not, however, obligated to this course, since he exercised very considerable discretionary powers in the handling of actions. He could himself sustain the plea and dismiss the action summarily if he saw fit, or he could even decline to receive a complaint when it was first presented, without waiting for the intervention of a παραγραφή.[3] Furthermore there can be little doubt that his authority extended to the summary denial of a παραγραφή, without reference to a dicastery.[4] This leads us to inquire upon what basis these powers were granted and with what limitations. What were the considerations that determined a magistrate at one time to reject a proffered complaint, at another to dismiss an action summarily at the ἀνάκρισις as the result of a παραγραφή, or in another instance to refer the question of admissibility to a dicastic court? Was he guided solely by his individual judgment in dealing with each case, or was his course predetermined by general rules of law or established precedents which he merely applied to particular situations? This question, while in some of

[1] The last of three studies on problems connected with special pleas in Attic law; for the earlier papers cf. *Class. Phil.*, XIII, 169–85; XIV, 20–28.

[2] Lipsius, *Recht*, p. 854.

[3] *Ibid.*, pp. 845, 854, 818 f.; cf. *MSL*, pp. 833, 795 ff.

[4] Cf. Platner, I, 158; Lipsius, *Recht*, p. 835. While Lipsius does not explicitly state that a magistrate could deny a παραγραφή summarily, he evidently assumes that he had this power, as appears from the words "Ist eine Einrede gegen die Klage . . . . zurückgewiesen." This assumption is necessary and merely extends to παραγραφή the powers which magistrates are known to have exercised in the case of other forms of pleading. If a magistrate had been obliged to convoke a dicastic court for the trial of every plea in bar of action, however trivial or faulty it might be, judgment could have been evaded indefinitely by merely bringing in a succession of special pleas. The writer has cited elsewhere a case which indicates that public arbitrators could deny special pleas without reference to the examining magistrate (*Class. Phil.*, XIV, 25).

its phases it concerns chiefly the student of special pleas, in its entirety embraces the whole matter of the powers and functions of Athenian magistrates.

Schoemann long ago attempted to solve the problem by distinguishing between the grounds for dismissal "welche ihrer Natur nach schon bei der Annahme der Klage zur Sprache kommen konnten oder mussten" and those "welche bei der Anakrisis vom Gegner vorgebracht wurden."[1] In the first class[2] he includes cases in which (1) the person of plaintiff or defendant constitutes a bar of action, or the suit is obviously inadmissible;[3] (2) the defendant does not appear and the προσκλησις is not established; (3) the plaintiff declines to put his pleading in the form required by the magistrate; (4) the premises do not constitute legal ground for action, or at least for the action proposed; (5) the action is not instituted at a time provided by law; (6) the action does not fall within the jurisdiction of the magistrate. In the discussion of the first, fourth, and sixth grounds, however, we note the qualifying statement that "wenn die Behörde über die Zulässigkeit der Klage nur zweifelhaft war," he could receive the complaint and wait for the defendant to assail its admissibility by a special plea. In the chapter on the special pleas,[6] Schoemann presents a list of the grounds for dismissal "welche bei der Anakrisis vom Gegner vorgebracht wurden." And here we find repeated the first, fourth, and sixth items of the earlier list, with the addition of pleas of "accord and satisfaction," previous judgment, and the law of limitations. When this classification is analyzed, it is seen that the items which appear exclusively in the first list embrace merely matters of formal detail in which the plaintiff could readily amend his procedure to meet the magistrate's requirements.[5] The really important grounds for dismissal, having to do with the status

[1] *MSL*, p. 833.

[2] *Ibid.*, pp. 795 ff.

[3] The classification here of cases in which the inadmissibility of the action was apparent "auf den ersten Anblick" is of course illogical.

[4] *Ibid.*, pp. 833 ff.

[5] If through ignorance or carelessness the plaintiff had committed some purely formal error in pleading, or presented his complaint at the wrong time, or neglected to have proof of the προσκλησις at hand, he was doubtless given an opportunity of rectifying the mistake before his suit was thrown out of court.

of plaintiff or defendant, the legal basis of the action, and the competency of the court, appear in both lists. Furthermore it is quite conceivable that under certain circumstances a magistrate might, without waiting for a παραγραφή, refuse to receive a complaint on one of the grounds that are here assigned exclusively to the second class.[1] We must therefore conclude that in general these causes of dismissal might become operative at any stage in the proceedings and that the distinction attempted by Schoemann is unsound. If this be so, his contribution toward the solution of our problem is reduced to the rather vague statements that the magistrate could accept a complaint and await the filing of a special plea if he "über die Zulässigkeit der Klage nur zweifelhaft war," and that he could refer the special plea to a dicastic court "wenn sie selbst darüber nicht entscheiden konnte oder wollte." These bring us no nearer to a real comprehension of the principles that guided him in the exercise of his functions.

Heffter had been content to dismiss the problem with the mere conjecture "dass die Archonten eine ganz unstatthaft scheinende Klage zurückweisen konnten."[2] Platner gave it more serious consideration and distinguished between the summary rejection of a complaint[3] and the handling of a special plea,[4] which might be decided by the magistrate or referred to a dicastic court. His treatment, which is chiefly concerned with the plea to the jurisdiction, is less systematic and complete than Schoemann's. It is open to the same objection, that he undertakes to define the magistrate's powers by classification of the various grounds for dismissal. He assumes certain classes of objections to have been decided by the magistrate and others to have been reserved for trial before the dicasts, and does not perceive that most pleas in bar of action might in one case be ruled on by the magistrate and in another brought before a dicastic court. Platner's nearest approach to the formulation of any general principle is the interesting suggestion that pure questions

[1] For example, the magistrate might discover from a statement of the plaintiff that the latter was, through ignorance of the law, presenting a complaint that was barred by the "statute of limitations." In such a case he certainly would not wait for the ἀνάκρισις and the filing of a special plea but would reject the complaint on the basis of the plaintiff's admission.

[2] P. 288. [3] Vol. I, p. 125. [4] *Ibid.*, pp. 158 ff.

of law might have been decided by the magistrates.[1] Unfortunately he does not proceed to a critical examination of the question he raises, since he finds an obstacle in the special pleas based on the amnesty,[2] but turns aside to the consideration of pleas to the jurisdiction and does not return to the more general aspects of the problem.

Lipsius in his revision of *Der Attische Process* adopted Schoemann's conclusions practically without change or comment.[3] In *Das Attische Recht* he makes very considerable changes in the arrangement of the material and gives less prominence to the classification that has been discussed,[4] but his conclusions are not different in any essential respect. There is unfortunately the same vagueness wherever the real problem is touched upon. "In solchen Fällen, in denen die Unzulässigkeit der Klage unzweifelhaft war," the magistrate must have had the right of summary rejection.[5] "In den weit zahlreicheren Fällen, in denen es einem Zweifel unterlag, ob eine Klage überhaupt oder wenigstens in der gewählten Form und vor der angerufenen Behörde gesetzlich zulässig war, der Beamte es auf die Einrede des Gegners gegen ihre Zulässigkeit ankommen liess."[6] Approximately a century of investigation has got us no further than this from Schoemann's "Zweifelhaftigkeit." It remains to be seen whether a search for cases and a careful analysis of the considerations upon which a dismissal might properly be based at the different stages in the preparation of a case for trial will be productive of any more definite results.

First to be considered is the rejection of a complaint by the magistrate prior to the introduction of the defendant's pleading and consequently without the intervention of *παραγραφή*. A case which manifestly belongs here is that in which the *βασιλεύς* refused

[1] Vol. I, p. 158.

[2] Platner's reasoning here is faulty. In the law to which he refers (Isoc. xviii. 2) the clause *τοὺς δ' ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν* directs merely that the special plea is to be brought to trial and decided before the original action can proceed. Furthermore, the writer cannot subscribe to the view that pleas based on the amnesty involved only questions of law. The real obstacle to the assumption that pure questions of law were decided by the magistrates lies in the nature of the dicastic courts and the fundamental theory of their institution (cf. *infra*, p. 349).

[3] *MSL*, pp. 795 ff., 833 ff.

[4] *Ibid.*, pp. 818 f.

[5] *Ibid.*, pp. 818 f., 845.

[6] *Ibid.*, p. 845.

to entertain Philocrates' action against the Choregus for homicide.[1] When the complaint was tendered, the magistrate, after having read out the laws which required him to hold three προδικασίαι in three successive months and to bring the action into court in the fourth month, pointed out that the time remaining to his term of office was insufficient and that he was not permitted to hand over an action pending to his successor. In this instance of rejection "auf den ersten Anblick" the grounds of the magistrate's action are quite clear. His course is determined by the laws in his possession and by a fact of which he takes judicial notice, namely, the date on which his term of office expires. It is quite likely that in the same way the magistrate would dismiss an action if facts which constituted a bar to its admissibility were confessed on the face of the complaint. For example, to take an extreme case, we cannot believe that the polemarch would entertain a complaint in a civil action in which the parties were given the official designations that showed them to be Athenian citizens.

Quite as instructive are a number of cases which show that magistrates could dismiss actions upon the basis of facts established by examination of the plaintiff. The so-called Draconian laws concerning homicide required that plaintiffs should be interrogated regarding their relationship to the victim and should affirm upon oath that they were within the degree of relationship that conferred the right of prosecution.[2] If they declined to take the oath and thereby admitted that they were not entitled to prosecute, the action was dismissed. This same principle is illustrated by the action of the Eleven in connection with the ἀπαγωγή brought by Dionysius against Agoratus. The complaint did not contain the phrase ἐπ' αὐτοφώρῳ, and the Eleven "compelled" Dionysius to insert it.[3] This must mean, as Lipsius has observed,[4] that they would have rejected the action if he had refused to make the insertion. A refusal to include the affirmation demanded could have been construed only as an admission that the circumstances of the offense

[1] Ant. vi. 38, 42; cf. Lipsius, *Recht*, p. 809.

[2] [Dem.] xlvii. 70 ff., especially 72: ἐν τῷ ὅρκῳ ἐπερωτᾶν τί προσήκων ἐστίν.

[3] Lys. xiii. 85–87; cf. Lys. x. 10.

[4] *Recht*, p. 819.

did not legally justify prosecution by ἀπαγωγή. Another case that is interesting in this connection is that of a claimant for an estate who was "compelled" at the ἀνάκρισις to insert in his pleading, in order to prevent the summary rejection of his suit, the statement that his mother was the sister of the testator.[1] What we are dealing with in these cases is no mere meticulous observance of formal nicety. In each instance the affirmation required by the magistrate is necessary to put in controversy facts upon which the admissibility of the action is directly conditioned. A refusal to make the affirmation would have established conclusively the inadmissibility of the action sought.

It is of the utmost importance to note in regard to these cases that, while the plaintiff's refusal to plead a fact upon which his right of action depends is regarded as conclusively establishing the inadmissibility of his suit, his affirmative declaration of such a fact is not conclusive but merely serves to raise an issue which it is for the dicasts to decide. So in the Agoratus case a refusal to plead that the offender was taken ἐπ' αὐτοφώρῳ would have resulted in the immediate dismissal of the action by the magistrates, but the plaintiff's declaration that he was so taken merely puts the matter in issue. The magistrate has no authority to decide the question of fact thus raised, but can only receive the pleading and prepare it for presentation to the dicastic court. In these instances then we have a clear and definite basis for the summary rejection of a complaint. The magistrate knows the laws governing the admissibility of actions, for he is in possession of official copies.[2] That is to say, he knows what several actions fall within his jurisdiction, the times at which they may properly be instituted, and the persons in whom the right of action is reposed as well as the issues of fact that may properly be raised by the plaintiff's declaration in each several action. These laws he applies to facts of which he takes judicial notice, or those which appear

[1] Isaeus x. 2: ἠνάγκασμαι . . . . τὴν μητέρα τὴν ἐμὴν ἐν τῇ ἀνακρίσει Ἀριστάρχου εἶναι ἀδελφὴν προσγράψασθαι. Wyse seems to be on safe ground when he concludes that the speaker had no valid claim to the estate as grandson of Aristarchus I, "and was only allowed to proceed on condition of amending his plea and petitioning as nephew of Aristarchus II" (*Isaeus*, p. 651; cf. p. 654). See also Lipsius, *Recht*, p. 819, n. 55.

[2] Ant. vi. 38; *CIA* i. 61. 5–6.

on the face of the complaint, or are conclusively established by admissions of the plaintiff, or by the plaintiff's refusal to plead. If any of these facts, so established, constitutes a bar to the admissibility of the action, he has no choice but to dismiss the suit at whatever point in the proceedings its inadmissibility is established. But if its inadmissibility is not so established, and an issue of fact is properly tendered by the plaintiff, the magistrate cannot dismiss the action.

We have now to consider the conduct of a case subsequent to the defendant's appearance and the filing of his pleading. This pleading might always take the form of an answer or general denial of the matters alleged in the complaint. In that event an issue or issues of fact arose upon the pleadings, and apparently the only course open to the magistrate was to refer those issues to a dicastic court for decision. In no case do we find evidence that an involuntary dismissal could be ordered where the defendant had answered by a general denial. This is entirely in consonance with the principle that was found to govern in the earlier stages of the proceedings, for to order a dismissal under these circumstances would be in effect to sustain the defendant's answer and thereby to decide the issues of fact that arose upon the pleadings.

In many instances the defendant did not enter a general denial but resorted to *διαμαρτυρία* or *παραγραφή*, pleas which frequently stated a fact or facts relied upon in bar of action.[1] The question of admissibility thus raised was, as has been noted,[2] sometimes decided by the magistrate and sometimes referred to a dicastic court. We may now consider the magistrate's part in the proceedings that followed the introduction of these special pleas. Nowhere does the principle which has been developed appear more distinctly than in the procedure that was followed in case the defendant elected to set up a bar of action by means of *διαμαρτυρία*. The successive steps fortunately are well established.[3] The defendant introduced a witness who deposed that the action was inadmissible. Impeachment of the witness by the plaintiff was followed immediately by

[1] As, for example, that there has been a private arbitration of the plaintiff's claim and an award, or that the plaintiff has given a release from all claims.

[2] Cf. *supra*, pp. 341–42.

[3] See Lipsius, *Recht*, pp. 854 ff.

the dismissal of the action,[1] which could be reinstated only upon the successful prosecution of the perjury charge. If the plaintiff declined to prosecute and thereby admitted the facts relied on in bar, his refusal was taken to establish such facts conclusively and the order of dismissal which had been entered by the magistrate became final.[2] But if the plaintiff brought an action for perjury against the witness and thereby accepted the issue tendered by the defendant, an issue of fact arose upon the pleadings, and this was not decided by the magistrate but was referred to a dicastic court for trial.

We may now proceed with some confidence to apply this principle in the analysis of the successive steps that followed the filing of a παραγραφή. The magistrate's first duty was to rule upon the admissibility of the special plea.[3] It is quite obvious that it was not within his province to question the existence of the fact or facts maintained in the plea, but merely to assure himself that those facts would if established constitute a bar of action as provided by the laws governing admissibility.[4] In other words, he did not undertake to decide the issue of fact tendered by the παραγραφή but merely assured himself that it was proper matter for a special plea in bar. If the παραγραφή was accepted, it next devolved upon him to give the plaintiff an opportunity of pleading to it.[5] If the plaintiff declined to plead, which amounted to a withdrawal of his action, the παραγραφή was sustained and the magistrate ordered a dismissal.[6] This he could do because the refusal to plead, like the refusal to prosecute the witness in διαμαρτυρία, was an admission of the facts relied on in bar and the dismissal was in effect voluntary. If a magistrate ever

[1] Isaeus v. 17.

[2] There is a case (Isoc. xviii. 11–12) in which an action is brought a second time after διαμαρτυρία without prosecution of the witness, but this was clearly an irregular proceeding. See *Class. Phil.*, XIII, 179.

[3] *Supra*, p. 338.

[4] *Infra*, p. 349.

[5] The plea to the παραγραφή appears to have been unwritten and quite informal, for in *Nicobulus* vs. *Pantaenetus*, a παραγραφή, the original complaint and the παραγραφή seem to constitute the pleadings before the court (*Dem.* xxxvii. 22 ff.). See Platner, I, 137.

[6] Cf. the rule in common-law pleading that "issue when well tendered must be accepted" (Stephen, *On Pleading* [9th Am. ed.], *56–60).

ordered an involuntary dismissal at this stage,[1] it could have been only because the plaintiff had admitted in response to interrogation some fact that constituted a bar of action. Failing such an admission, if the plaintiff pleaded to the παραγραφή and thus accepted the issue tendered by the defendant, the magistrate must have had to refer the issue of fact that arose upon the pleadings to a dicastic court for trial.

To sum up briefly, the magistrate's power of dismissing actions was not exercised arbitrarily or at random, but was determined and regulated by a consistent and reasonable principle of jurisprudence. The laws provided, directly or indirectly, that the existence of certain facts should effect a bar of action in certain suits.[2] At whatever stage in a legal proceeding such a fact was conclusively established and there was no longer need for the introduction of evidence to prove it, the magistrate dismissed the action.[3] But whenever an issue of fact was properly tendered and accepted, the issue that thus arose was referred to a dicastic court for trial.

At this point a question of some importance suggests itself. What recourse had the plaintiff when the magistrate dismissed his action improperly? If, for example, the magistrate disregarded the principle that has been developed and sustained a παραγραφή when its allegations of fact were disputed and should have been established by evidence before a dicastic court, had the plaintiff no legal remedy? The magistrate was of course responsible for his official acts and could

[1] Cf. Lipsius, *Recht*, p. 854: "von der Behörde zurückgewiesen," Lipsius finds a case of this kind in Lys. xvii. 5: διεγράψαντό μου τὰς δίκας ἔμποροι φάσκοντες εἶναι. It is quite possible that this is an instance of dismissal, but we cannot be certain, as the wording of the passage does not exclude the possibility that the special plea was sustained by a dicastic court.

[2] On the form in which these provisions were enacted see *Class. Phil.*, XIII, 174–76. An example of a provision which operated indirectly as a bar of action under certain circumstances is the requirement of three προδικασίαι at intervals of a month in homicide cases; cf. *supra*, p. 342.

[3] The writer has been unable to find anything in Lipsius' discussion of special pleas that may be construed as a recognition of this principle except the statement (*Recht*, p. 854) that in actions that were expressly forbidden by law "wenn der Tatbestand nicht zu bestreiten war, die Behörde zur Abweisung der Klage befugt war, lässt sich nicht wohl bezweifeln." This is a passing observation upon this single class of actions, and seems to be rather a reflection of Platner's idea that the magistrate decided questions of law (cf. Platner, I, 158; *supra*, pp. 340–41) than a recognition of the principle that has been developed in this study.

be held accountable for improper conduct at his audit or even at the ἐπιχειροτονία which took place once in each prytany.[1] But it may well be doubted whether this provision for the punishment of the offending officer offered the plaintiff an adequate or convenient remedy for the injustice and injury he might sustain through an improper decision. Lipsius remarks that in cases of a certain class the plaintiff whose action was dismissed must have had the right "eine Entscheidung durch den Gerichtshof zu erlangen." Unfortunately he presents no evidence in support of his conjecture and makes no suggestion as to the means by which such an appeal might be taken.[2] However, there happens to be a case that affords a satisfactory solution of the difficulty. In *Aristodicus* vs. *Pancleon*[3] the defendant was cited to appear before the polemarch. He appeared, but when called on to file his answer to the complaint entered a plea to the jurisdiction in which he affirmed that he was a Plataean, that is, a citizen, and could not be sued in the court of the polemarch. The plaintiff thereupon had recourse to διαμαρτυρία and produced a witness who deposed that Pancleon was not a Plataean. Although Pancleon gave notice of his intention to prosecute the witness, he did not file a complaint within the prescribed time, and thus permitted the plaintiff to go on with his action and eventually to secure a verdict. We cannot be certain that in this instance the polemarch had sustained the special plea and was going on to dismiss the complaint, but it is very likely that this was the case. Otherwise the plaintiff would have been under no necessity of incurring the trouble and risk of διαμαρτυρία, but would simply have accepted the issue tendered by the defendant and allowed the question of admissibility to come into court on the special plea.[4] However, it is immaterial whether in this instance the magistrate actually sustained the plea; the importance of the case lies in the fact that it illustrates a simple and effective proceeding by which the plaintiff who feels that his suit has been dismissed improperly can have the question of admissibility brought directly before a dicastic court.

[1] *MSL*, p. 798; Lipsius, *Recht*, p. 819. [2] *Recht*, p. 854.

[3] Lys. xxiii. 13–14. The case is correctly analyzed by Shuckburgh (notes *ad loc.*) and by Wyse (*Isaeus*, p. 233).

[4] *Infra*, p. 348.

No one so far as the writer is aware has yet suggested a satisfactory explanation of the fact that διαμαρτυρία was employed by plaintiffs as well as by defendants. Heffter,[1] Schoemann,[2] and Platner[3] all state that διαμαρτυρία was employed by the plaintiff to oppose a παραγραφή filed by the defendant, and all cite the Pancleon case, which is the only instance of διαμαρτυρία on the part of a plaintiff. Here the question has been allowed to rest. They do not tell us *why* the plaintiff should take the trouble of presenting a witness when he could achieve the same result without annoyance, delay, or risk merely by pleading to the παραγραφή. Nothing is added to our knowledge by the observation of Lipsius that διαμαρτυρία on the part of the plaintiff "nur selten vorkam" because "das Vorhandensein eines Hindernisses leichter zu bezeugen ist als sein Fehlen."[4] What we wish to know is why a plaintiff should have employed it at all, except when he was sure that the παραγραφή was a mere dilatory maneuver and that the defendant would not venture to prosecute the witness. Under what circumstances did it procure him an advantage commensurate with the trouble and risk it entailed, or when was it necessary to keep his complaint from being dismissed? The answer is clearly that suggested above. Διαμαρτυρία was employed by the plaintiff in case the magistrate sustained, improperly in the plaintiff's opinion, a special plea in bar; it was a means of appealing from the ruling and getting the question of admissibility before a dicastic court.

It has been convenient to distinguish repeatedly between the magistrate's application of the law to established facts and his reference of an issue of fact to the dicastic court. This is not to be

[1] Pp. 348 ff. Heffter suggests (p. 349) that "es dem Kläger nur erlaubt war, der Paragraphe des Gegners durch eine Diamartyrie zu begegnen und dadurch das Verfahren in der Euthydikia zu erhalten." But διαμαρτυρία can keep the proceedings to εὐθυδικία only if the defendant declines to prosecute the witness, and he would not ordinarily decline if he had already entered a παραγραφή on his own initiative. The proceeding could have had the effect Heffter ascribes to it only in case the παραγραφή was not a bona fide attempt to bar the action but a mere trick to cause delay, as it appears to have been in the Pancleon case. For if the defendant prosecutes, the plaintiff has gained nothing by his maneuver and might better have pleaded to the παραγραφή (cf. *infra*, p. 349).

[2] *MSL*, p. 842.

[3] Vol. I, p. 165.

[4] *Recht*, p. 854, n. 30.

confused with Platner's suggestion[1] that "eine reine Rechtsfrage" was decided by the magistrate, or with the principle observed in modern jurisprudence that questions of law are for the court, questions of fact for the jury. The examining magistrate and the dicastic court do not correspond to our judge and jury either in theory or in practice. The dicasts constituted a court of last resort that exercised final jurisdiction in the trial of all questions both of law and of fact. However, there could have been no effective administration of justice if provision had not been made for an authoritative summary application of the laws that governed the admissibility of actions. To this end the magistrates were permitted, even after the final jurisdiction had been vested in the dicastic courts, to continue in the exercise of certain discretionary powers and to dismiss summarily actions they deemed inadmissible. Since a litigant could always take an appeal by *διαμαρτυρία*, this involved no surrender of authority on the part of the dicastic courts. In the event that a real question of law, which necessitated a judicial decision, was raised, the magistrate no doubt referred it to the dicasts as readily as he did issues of fact.[2] The function of the magistrate was the application of the law to proved facts; interpretation of the law and determination of disputed facts were alike reserved for the dicasts. The basis of this distribution of functions is a distinction, not between questions of law and questions of fact as in English and American courts, but between matters either of law or of fact that stand unquestioned or proved and those that require determination. Since in Athens there was little legal interpretation and pure questions of law were seldom raised,[3] in the majority of cases we find the magistrate applying the law but referring issues of fact to the dicasts. Consequently the evidence available for a solution of our problem has to do rather with questions of fact

[1] *Supra*, p. 340.

[2] We have no instance in which a pure question of law is argued during the preparation of a case for trial. But the burden of proof obviously would rest upon those who maintained that the magistrate would undertake to decide finally legal questions of importance.

[3] Occasionally we find a question of law being argued before a court, but the whole tendency of development in Attic law was away from interpretation and definition of laws through decisions and toward the simple and direct application of legislative enactments.

than with questions of law, and our conclusion has been formulated accordingly. In effect it is that the magistrate made no decisions which required to be based on evidence. This suggests that the Athenians were not unfamiliar with the principles of judicial proof.[1]

In conclusion, it may be observed that the system of pleading which we have traced in its general outlines compares not altogether unfavorably with those that have been established by our own codes of civil procedure in many states.

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[1] It will prove interesting to apply to the cases that have been studied the remarks of Mr. Justice Stephens (*Digest of the Law of Evidence*, Articles 58–60 [4th Eng. ed.]) on the judicial proof of facts: judicial notice, admissions by the parties, and evidence.